OCT 30 1990
JOSEPH F. SPANIOL, JR
CLERK

No. _____

In The

Supreme Court Of The United States

OCTOBER TERM, 1990

JOSEPH ZINKER, AS EXECUTOR OF THE ESTATE OF NANCY ZINKER, DECEASED,
Petitioner

v.

J. PAUL DOTY, INDIVIDUALLY AND JUDITH A. KEMP, INDIVIDUALLY,
Respondents

SUPPLEMENTAL APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

NANCY ZINKER,
Plaintiff,

vs.

J. PAUL DOTY, ET AL,
Defendants.

CIVIL
H-85-337
(JAC)

JUNE 19, 1987
NEW HAVEN
CONNECTICUT

B E F O R E:
HON. JOSE A. CABRANES, U.S.D.J.

RULING OF THE COURT

Appearances:

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THE COURT: Thank you for your patience. I know that you are all more interested in decisions than in elaborate exegeses, so that it's important that you have a decision from the Court as early as possible, and I'm happy to be able to give it to you now.

Upon a review of the entire record, including extensive briefing by the parties, volumes of deposition, affidavit, and documentary evidence, and the argument of counsel here today, I am prepared to rule on defendants' motions for summary judgment.

Summary judgment "is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole which are designed 'to secure the just, speedy and inexpensive determination of every action.'" Celotex Corp. v. Catrett, 106 S.Ct. 2548, 2555 (1986).

In order to grant a motion for summary judgment, the court must find that there is no "genuine issue of material fact" and that "the moving party is entitled to judgment as a matter of law." Rule 56(c), Federal Rules of Civil Procedure. In determining whether there is a material issue of fact, the court must "resolve all ambiguities and draw all inferences against the moving party." Schwabenhauer v. Board of Education, 667 F.2d 305, 313 (Second Circuit 1981).

However the party opposing summary judgment "'may not rest upon mere conclusory allegations or denials' as a vehicle for obtaining a trial," but instead "must bring to the district court's attention some affirmative indication that his version of relevant events is not fanciful." Quinn v. Syracuse Model Neighborhood Corporation,

613 F.2d 438, 445 (Second circuit 1980), quoting SEC v. Research Automation Corporation, 585 F.2d 31, 33 (Second Circuit 1978). Summary judgment is mandated "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex Corp. v. Catrett, supra, 106 S.Ct. at 2553.

Turning, first, to plaintiff's procedural due process claim, there is evidence sufficient to raise an issue of material fact on the question whether Ms. Zinker was provided with an adequate pretermination notice and opportunity to be heard as required by Cleveland Board of Education v. Loudermill, 105 S.Ct. 1487, 1493 (1985).

However, defendants Heintz, Kemp, and Doty argue that the Eleventh

Amendment bars money damages against them in their official capacities, and that they are entitled to qualified immunity in their individual capacities because they took the actions that allegedly violated plaintiff's procedural due process rights in their capacity as government officials exercising discretion in an area in which the law was not clearly established.

The Court, and plaintiff, agree that no money damages are available against defendants in their official capacities; however, prospective injunctive relief is not barred by the Eleventh Amendment.

The question remains whether defendants are entitled to qualified immunity in their individual capacities. While plaintiff argues that defendants were not exercising discretion, but were merely engaged in ministerial duties,

this argument is without merit. Nevertheless, in order to take shelter under the doctrine of qualified immunity, defendants must show not only that they were exercising discretion, but also that the state of the law they are purported to have violated was not clearly established. Harlow v. Fitzgerald, 457 U.S. 800, 181, 102 S.Ct. 2727, 2738.

The precise method for determining whether the state of law is clearly established has never been clearly articulated by the Supreme Court. See Harlow v. Fitzgerald, supra, 457 U.S. at 818 n. 32, 102 S.Ct. at 2738, n. 32. Defendants point to previous Supreme Court decisions and decisions of the Courts of Appeals of other Circuits in support of the position that the right of a public employee with a protectible property interest in her job to a

pretermination hearing was not clearly established prior to the Supreme Court's decision in Loudermill.

However, the Supreme Court in Loudermill stated that the rule requiring "some kind of hearing" prior to the discharge of "an employee who has a constituionally protected property interest in his employment ... has been settled for some time." Loudermill at 1493.

Defendants' citation of rulings in other circuits to the contrary, this Court must agree with the Supreme Court that such a right had been clearly established by the time of plaintiff's dismissal. If plaintiff can establish at trial that defendants did not provide her with adequate pretermination process, defendants may not invoke the qualified immunity defense to bar damages against them in their individual

capacities.

The somewhat artificial distinctions proposed by defendant Elisha Freedman, then Commissioner of the Department of Administrative Services of the State of Connecticut, as to his lack of obligation to provide pretermination procedures that comport with due process under Loudermill cannot be accepted. The State of Connecticut has chosen to structure its relations with its employees so that defendant Freedman had the responsibility to promulgate policies with respect to the termination of public employees.

There is evidence in the record that the Department of Income Maintenance, or "DIM," defendants relied on these policies. If these policies were constitutionally deficient as applied to the plaintiff, then defendant Freedman may be held liable in his official

capacity (the only capacity in which he is named in the complaint) for this failure, because his promulgation of the policies provides the predicate personal involvement for liability under Section 1983. See Williams v. Smith, 781 F.2d 319, 323 (Second Circuit 1986).

However, plaintiff has not put forth any evidence in support of her claims that the "third level" hearing held by Mr. Sulla included "ex parte" consultations or other violations of due process. On the other hand, the argument that the substantive findings of the "third level" hearing are entitled to preclusive effect in this court are completely without merit, inasmuch as they would not even be entitled to preclusive effect at the next level in Connecticut's own administrative process.

In view of the fact that plaintiff

predicates Count One of her complaint on the claim that the combination of pretermination and post-termination process afforded her under Connecticut law is unconstitutional, plaintiff cannot be said to have "waived" any right to have the substance of her constitutional and federal law claims adjudicated in this court.

For the reasons stated above, the motion for summary judgment of defendants Heintz, Doty, and Kemp, and the motion for summary judgment of defendant Freedman as to Count One of the complaint are granted as to the allegations concerning the "third level" hearing only; otherwise, those motions are denied.

We turn now to the First Amendment claim. At the outset, the Court rejects defendants' argument that only Commissioner Heintz can be considered

plaintiff's employer for the purpose of determining the validity of her claim under the First Amendment. The record amply shows the personal involvement of the other defendants in the actions taken against the plaintiff, and in fact, defendants Doty and Kemp's personal involvement appears to have been far greater than that of Commissioner Heintz, which is not surprising given the organizational structure and the function of DIM.

The parties agree as to the legal standard to be applied to plaintiff's First Amendment claim under the rule of Pickering v. Board of Education, 391 U.S. 563, 88 S.Ct. 1731 (1968) and Connick v. Myers, 461 U.S. 138, 103 S.Ct. 1684 (1984).

First, Plaintiff must show that her speech was constitutionally protected. Next, plaintiff must show that the

protected speech was a substantial or motivating factor in her dismissal. If plaintiff has met her burden on these two elements, defendant must show that the same decision would have been taken irrespective of plaintiff's conduct. Pickering v. Board of Education, supra; Connick v. Myers, supra; Mt. Health City School District Board of Education v. Doyle, 429 U.S. 274, 97 S.Ct. 568 (1977); Givhan v. Western Line Consolidated School District, 439 U.S. 410, 99 S.Ct. 693 (1979).

However, in order to avoid excessive intrusion upon the discretion of government officials in managing their office, in all but the most extraordinary cases, judicial intervention to vindicate First Amendment rights will occur only if it is possible to fairly characterize the public employee's speech as touching upon a

matter of public concern. Connick v. Myers, supra, 461 U.S. at 146-47, 103 S.Ct. at 16990. Whether the speech addresses a matter of public concern must, in turn, be determined by reference to "the content, form, and context of a given statement, as revealed by the whole record." Id., 461 U.S. at 147-48, 103 S.Ct. 1690.

Plaintiff's dismissal can still be upheld if the state can demonstrate that its actions were taken to further "the government's interest in the effective and efficient fulfillment of its responsibilities to the public." Id., 461 U.S. 150, 103 S.Ct. 1692. This determination requires an act of "particularized balancing" by the court, depending upon the facts of the case. Id.

In this case, defendants Heintz, Doty, and Kemp argue that the Court need

not even look to the three-part test because the undisputed evidence shows that these defendants were unaware of plaintiff's speech concerning the CLEM system and her opposition to the contracting out that she claims was the basis for her termination. Furthermore, they argue that such speech cannot be characterized as touching a matter of public concern as defined by the Supreme Court in Connick v. Meyers. They also argue throughout their papers that plaintiff was properly dismissed for violating agency rules as to the use of compensatory time, falsifying time records, and failing to acknowledge her errors, so that plaintiff would have been dismissed in any event.

However, plaintiff's affidavits and other evidence in the record cast each of defendants' arguments sufficiently into doubt to preclude the granting of

summary judgment as to this issue.

First of all, there is admissible affidavit evidence to show that defendant Doty was aware of, and opposed Ms. Zinker's position as to CLEM and the alternative of contracting out the eligibility Management System. See Affidavits of Gary R. Thompson and John Ely, attached to Appendix to Plaintiff's Memorandum in Opposition to Defendants' Motion for Summary Judgment.

The subject of Ms. Zinker's speech, with its emphasis on promoting efficiency and conservation of public funds, does touch on an issue of public concern. Furthermore, inasmuch as defendants have argued that they were unaware of this speech, they have naturally not argued that this particular speech disrupted relationships or otherwise impeded the efficiency of the department. Finally,

there is evidence in the record that other employees who used comp. time and kept sloppy records -- including perhaps even Mr. Doty -- were not terminated, and therefore defendants have not been able to show that Ms. Zinker would have been terminated in any event for her alleged offenses.

Accordingly, summary judgment as to Count Two of plaintiff's complaint is denied.

We turn now to the Title VII claims. Defendants Heintz, Doty, and Kemp have mounted a variety of attacks on plaintiff's Title VII claims:

They allege that Paragraphs 14a, 14c, and 14e are beyond the scope of plaintiff's administrative charge; that Paragraph 14e is also untimely; that the claims themselves lack substantive merit; and that some of them fail to state a claim upon which relief can be

granted. They also contend that defendants Doty and Kemp are not proper defendants because they cannot be considered plaintiff's employer under Title VII.

Both parties agree that this Court may consider both claims made in the administrative complaint, and claims "reasonably related" to the original charges. Almendral v. New York State Office of Mental Health, 743 F.2d 963, 967 (Second Circuit 1984).

Defendants argue that Paragraphs 14a, 14c, and 14e, are not reasonably related to the charges of discrimination in plaintiff's reprimand and dismissal, and that to allow such claims would vastly complicate an already complicated case. On the other hand, DIM defended these charges by emphasizing defendant Doty's history of fair and equitable treatment of Ms. Zinker.

Once defendants raised previous fair treatment as a defense, it seems perfectly logical that plaintiff would be stimulated to demonstrate that her previous treatment was not fair and equitable, and therefore, it can be said, based on defendants' response, that the charges are "reasonably related" to, or naturally grow out of, plaintiff's original complaint.

Defendants also appear to read Meritor Savings Bank, FSB v. Vinson, 106 S.Ct. 2399 (1986) too narrowly in their argument that several of plaintiff's claims do not relate to "terms, conditions or privileges of employment." Actual sexual advances do not appear to be a prerequisite to a Title VII claim based on a theory of a "hostile environment." Id. 106 S.Ct. at 2404-2406.

Defendants also argue, however, that

plaintiff has failed to make out a prima facie case on several of her claims, and have provided numerous examples in her deposition testimony in which plaintiff seems to concede that male employees were treated no differently than she was. See, for example, Deposition Testimony of Nancy Zinker, Volume II, at page 64, attached as Appendix to Defendants' Heintz, Doty, and Kemp's Second Revised Memorandum in Support of Motion for Summary Judgment.

The Court must agree with defendants that having had ample time to conduct discovery, plaintiff has produced no more than "conclusory allegations of discrimination which are insufficient to satisfy the requirements of Rule 56(e)" Meiri v. Dacon, 759 F.2d 989, 998 (Second Circuit 1985), particularly as to Paragraphs 14a, 14b, 14c, 14d, 14f, 14g, and 14i. Plaintiff conceded in her

deposition testimony that defendant Doty interfered in the relationship between male managers and their subordinates; that males as well as females may have felt intimidated by Mr. Doty's managerial style; and that females as well as males may have improperly used comp. time without being terminated.

However, the record does indicate that plaintiff has made out a prima facie case as to her termination in Paragraph 14h in that she is a member of a protected class, she was terminated and her job remained open, and that there is evidence to show that the employer's supposed reasons for terminating her may have been pretext.

As to the failure to promote claim in Paragraph 14e, the Court must acknowledge that the process of promotion described is one whose precise workings in practice are difficult to

grasp; in any event, the claim does not appear to be untimely, and the record does not exclude the possibility that plaintiff was treated differently on account of her sex as to the possibility of promotion.

Finally, the Court notes that in their official capacities defendants Doty and Kemp, as well as defendant Heintz, may be considered plaintiff's employer as to the Title VII claim arising from her termination, and that defendant Doty as well as defendant Heintz may be considered her employer for her claim alleging failure to promote. As such, their official successors, if not they themselves, may be held liable to plaintiff for any damages she might prove if she succeeds on her remaining Title VII claims.

Defendants' motion for summary judgment as to plaintiff's claims under

Title VII in Count Three of her complaint is granted as to Paragraphs 14a, 14b, 14c, 14d, 14f, 14g, and 14i, and denied as to Paragraphs 14e and 14h.

In conclusion, for the reasons stated above, defendants' Heintz, Doty, and Kemp's motion for summary judgment and defendant Freedman's motion for summary judgment are denied as to all but the claim in Count One that the "third level" hearing violated due process and the claims in Paragraphs 14a, 14b, 14c, 14d, 14f, 14g, and 14i of Count Three of plaintiff's complaint.

It is so ordered.

We are adjourned.

* * *

COURT REPORTER'S TRANSCRIPT CERTIFICATE

I hereby certify that the within and foregoing is a true and correct transcript taken from the proceedings held on June 19, 1987, in the United States District Court, for the District of Connecticut, at New Haven, before the Hon. Jose A. Cabranes, U.S.D.J.

_____
Official Court Reporter

DATED: _____ 1987.